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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE CARDENAS MORENO, Defendant and Appellant.	H037566 (Santa Clara County Super. Ct. No. C9923666)

Defendant Jose Cardenas Moreno appeals from an order denying his motion to vacate judgment pursuant to Penal Code section 1016.5.[1] In 1999, defendant pleaded no contest to threats to commit a crime resulting in death or great bodily injury (§ 422), injuring or obstructing telephone or cable lines (§ 591), and carrying a concealed and stolen firearm (former § 12025, subd. (a)(2)). Defendant was detained several years later by an immigration official, who informed him that he was no longer eligible to remain in the United States due to his criminal convictions. Defendant then filed a motion to vacate the 1999 judgment on the ground that the trial court failed to advise him of the immigration consequences of his plea. The trial court denied the motion. We conclude that the trial court did not abuse its discretion in denying the motion and affirm the order.

[1] All further statutory references are to the Penal Code unless otherwise specified.

I. Statement of Facts[2]

On March 20, 1999, Officer Young responded to a report that a man with a gun had threatened his wife. The officer spoke with Elena Garcia,[3] who stated that she and defendant were separated. Earlier that day, defendant confronted Garcia at a party to talk about their relationship. She told him that they had nothing to talk about, because he would never change. Defendant replied, "You know we swore under God till death do us part." In response to her comment that he should be happy that she was happy with her new boyfriend, defendant said, "OK, I'll settle that problem." That evening, Garcia heard defendant's car drive near the house, and her son Juan DeLeon went outside to confront him. Garcia also heard defendant yelling for her and her boyfriend David Fuentes to come outside. Her son told her that defendant had a gun. She then heard someone on the side of the house, and as her daughter was attempting to use the telephone, the telephone line went "dead." A police officer confirmed that the telephone box was damaged and Garcia stated that the damage was recent.

DeLeon told Officer Bays that there had been ongoing problems between his mother and defendant. Approximately two months earlier, when defendant learned that his mother had a boyfriend, he called the house every day, verbally abused her, came to the house, and harassed her. Defendant started to threaten violence against her and Fuentes within the last two weeks. On March 19, 1999, defendant threatened to kill Fuentes. The following day, defendant came to Garcia's house and told DeLeon's brother Steve that he was going to kill Fuentes and showed Steve his gun.

DeLeon told the officer that he went outside to smoke a cigarette and saw defendant park his car in the driveway. Defendant asked him to get his mother. After DeLeon asked him to leave, defendant said, "[G]et your mother and her boyfriend," then

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[2] Since defendant entered his plea prior to the preliminary hearing, the statement of facts is based on the police reports and the probation officer's report.

[3] In 1999, Elena Garcia's surname was DeLeon.

pulled out a gun and racked the slide. DeLeon entered the house and told his mother. When DeLeon came back outside, he told defendant to leave because his mother was not coming out. At that point, defendant walked to the side of the house, tried to enter it through a window, and ripped the telephone line out. Defendant then walked to the front of the house, kicked the door, and yelled, "[G]et that dog out here." Defendant also kicked Garcia's and Fuentes's vehicles. As DeLeon walked to his neighbor's house to call the police, defendant left. DeLeon also gave the police a threatening letter that defendant left on Fuentes's vehicle. The letter stated that "he was going to hurt/kill them . . . ."

Defendant was contacted by the police. After he waived his *Miranda*[4] rights, defendant stated that he parked his vehicle away from Garcia's residence because if he parked near her residence she would not come out. When he approached her residence on foot, his stepson DeLeon met him. Defendant asked his stepson to go inside and call Garcia. DeLeon refused and indicated that his mother did not want to talk to him. Defendant became angry and stated that he knew that Fuentes was inside. He then told DeLeon to get Fuentes and bring him out so that he could kill him. Defendant indicated that he did not show DeLeon his firearm, but defendant believed that DeLeon knew that he carried one for protection. After Garcia and Fuentes refused to come out, defendant walked back to his vehicle and was eventually arrested. Defendant told the police that he was glad that they had arrived because he was not certain of what he was capable of.

Police searched defendant and found a loaded semi-automatic handgun. A records check of the gun revealed that it was not registered to defendant. However, the officer was unable to locate the registered owner's address or telephone number to determine whether defendant lawfully possessed the firearm.

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Defendant admitted to his probation officer that he told DeLeon to tell Garcia's boyfriend to come outside, but DeLeon refused. Defendant also admitted that he told DeLeon that he was going to "kill the guy." Defendant left, but then returned because he thought "they might have come out of the house." The police stopped him, and he was glad because he "might have done something stupid." Defendant denied breaking the telephone line and claimed that he found the gun in a parking lot.

II. Procedural Background

On March 24, 1999, the district attorney filed a felony complaint that charged defendant with threats to commit a crime resulting in death or great bodily injury (§ 422 - count 1), injuring or obstructing telephone or cable lines (§ 591 - count 2), and carrying a concealed and stolen firearm (former § 12025, subd. (a)(2) - count 3).

On April 19, 1999, defendant pleaded no contest to all three counts in exchange for a disposition of no state prison and a jail term of one year, which would be concurrent to any sanction imposed due to his violation of probation in another case. On May 21, 1999, the trial court placed defendant on probation for three years with various fines and conditions, including a jail term of one year.

On March 15, 2011, defendant filed a motion to vacate judgment pursuant to section 1016.5. In support of his motion, defendant submitted his declaration in which he stated that he had been a lawful permanent resident of the United States since 1988. In July 2010, he was detained by an immigration official when he returned from a trip to Mexico. At that time, he was informed that he was no longer eligible to remain in the United States due to his 1999 convictions. According to defendant, when he entered his no contest plea, he was not aware that the convictions would have immigration consequences and if he had realized these consequences he would have sought a different resolution to his case.

Defendant also submitted a declaration by Saeed Ghaffari, an attorney with experience practicing immigration law. Ghaffari identified section 422 as a "crime involving moral turpitude," thus rendering a non-citizen inadmissible and subject to removal from the United States. Ghaffari also stated that when a defendant is sentenced to one year or more for a section 422 conviction, the crime is considered an "aggravated felony." Conviction of an aggravated felony is a "ground for deportability, and but for a few exceptions, the conviction ensures deportation, bars obtaining new lawful status, and blocks hope of waiver or defense." In pleading no contest to carrying a concealed and stolen firearm (former 12025, subd. (a)(2)), defendant also subjected himself to a deportation proceeding and his subsequent removal from the United States. Due to these convictions, defendant cannot naturalize to become a United States citizen and he is subject to mandatory detention without bond. According to Ghaffari, "[i]t is doubtful that had he been advised of the enormous immigration consequences of his plea, that he would have accepted a plea bargain of this stature, and instead fought the charges, or sought an alternative remedy. A simple assault plea, for example, would have avoided many of these consequences."

Defendant submitted Garcia's declaration in which she stated that she felt the March 20, 1999 incident "was blown out of proportion." She further stated that defendant's behavior towards her and others has been "excellent" since he was released from jail and that he has "rehabilitated himself into a wonderful human being." Defendant also included character reference letters from people associated with his employment as a landscaper, and proof of completion of a domestic violence program. In addition, defendant submitted an affidavit from the court reporter who transcribed the hearing at which defendant entered his no contest plea. She stated that she no longer possessed her notes for the hearing and thus was unable to provide a transcript.

At the hearing on the motion to vacate judgment, Garcia testified that she and defendant were married in 1997 and divorced in 2003. They were separated in March

1998. In March 1999, defendant was arrested at her home. Defendant knocked on the door and her son answered it. Her son told her not to go outside until defendant was gone. She did not see defendant or hear him threaten her. She did not see a gun. No one in her family had told her that defendant had threatened to kill her or any of her family members. Defendant damaged the telephone line when he stepped on it as he was trying to come into the house through the window. She did not remember that her son told her that defendant had a loaded gun and was threatening to hurt her and/or her boyfriend. She also did not remember a note on her boyfriend's car in which defendant threatened to kill her and her boyfriend.

DeLeon testified that he called the police on March 20, 1999. When defendant had arrived at their house, defendant was drunk, had a gun, and wanted to speak to Garcia's boyfriend. DeLeon went outside to calm him down. He called the police after defendant left. Defendant did not threaten DeLeon, Garcia, or her boyfriend. He remembered that defendant had pulled out his gun. Defendant was belligerent and kept repeating that he wanted to see Garcia and Garcia's boyfriend. Since the phone was damaged by defendant, DeLeon went to a neighbor's house to call the police. He did not remember what he said when he called the police.

The trial court issued an order in which it denied the motion. The trial court found that the prosecution had failed to rebut the presumption that the advisement of immigration consequences had not been given. It then concluded that defendant failed to establish prejudice, stating: "[I]t appears the District Attorney had a solid case. Defendant has not really proposed a defense and the few points in his favor were so weak that they would not have led to a different plea offer. Defendant has not shown what leverage or angle he could have pursued and therefore has not shown he had anything to take to trial. As noted above, the showing of prejudice that Defendant must make is that he would have done something differently. Because there has been no showing that Defendant had anything arguable to work with his present claim cannot be accepted."

III. Discussion

Defendant contends that the trial court erred in denying his motion to vacate judgment under section 1016.5.

Section 1016.5 requires that, before accepting a guilty or no contest plea, the trial court must advise the defendant that the plea "may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (§ 1016.5, subd. (a).) "To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.] On the question of prejudice, defendant must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised. [Citation.]" (*People v. Totari* (2002) 28 Cal.4th 876, 884.)

We review the trial court's ruling under the abuse of discretion standard. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192.) "An exercise of a court's discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice constitutes an abuse of discretion. [Citation.]" (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1518.) "Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them. [Citation.]" (*People v. Fairbanks* (1997) 16 Cal.4th 1223, 1254.) In deciding whether the defendant has made an adequate showing under section 1016.5, the trial court "is the trier of fact and . . . judge of the credibility of the witnesses or affiants. Consequently, it must resolve conflicting factual questions and draw the resulting inferences. [Citation.]" (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533, (*Quesada*), superseded by statute as stated in *People v. Totari* (2003) 111 Cal.App.4th 1202, 1207, fn. 5.)

With respect to the first element, there is a rebuttable presumption that the trial court did not give the advisements when there is no court record of them. (§ 1016.5, subd. (b).)[5] The prosecution bears "the burden of proving by a preponderance of the evidence the nonexistence of the presumed fact, i.e., that the required advisements were given. [Citations.]" (*People* v. *Dubon* (2001) 90 Cal.App.4th 944, 954 (*Dubon*).) *Dubon* held that a motion to withdraw a plea was properly denied when the trial judge, who had no independent recollection of the hearing, testified that his habit and custom in every case was to inform the defendant of the immigration consequences pursuant to section 1061.5. (*Id.* at pp. 949-950.)

Here, the prosecutor submitted a declaration stating that his habit and custom was to check off a form concerning the advisements as they were given, and that he checked them off in defendant's case. Relying on *Dubon, supra*, 90 Cal.App.4th 944, the Attorney General argues that the prosecution met its burden to establish that the required advisements had been given.

However, the trial court reasoned that "[i]f the checkmark of an impartial courtroom clerk is not good enough, *People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244-1245, . . . then the checkmark of an adversarial party does not suffice either." Thus, the trial court made a factual determination and concluded that the prosecution had failed to meet its burden. (*Quesada, supra*, 230 Cal.App.3d at p. 533.) This court must defer to the trial court on this finding. (*Ibid.*) Accordingly, we reject the Attorney General's argument.

Since there is no dispute as to the second element, that is, that defendant faces adverse immigration consequences as a result of his convictions, we turn to the third element of prejudice. Defendant contends that had he been warned about these

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[5] Section 1016.5, subdivision (b) provides in relevant part: "Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement."

consequences, there was a reasonable probability that he would not have pleaded no contest, because he could have negotiated a plea agreement that would not have involved conviction of an aggravated felony. He also claims that he could have negotiated a sentence of 364 days or less by waiving his custody credits or persuading the trial court to impose part of his one-year jail term in connection with his violation of probation. We conclude, however, that there was very little, if any, possibility that the prosecutor or the trial court would have agreed to a more favorable outcome if defendant had sought to negotiate one.

Defendant first claims that the evidence against him as to each of the counts was not strong. He points out that the jury could have found that he did not have the requisite mental state for a conviction of injuring or obstructing a telephone line, because "it is quite possible [he] damaged the telephone line by accident as he clambered around on the side of Ms. Garcia's house." Even assuming that the evidence as to this count did not establish malice, we disagree with defendant's characterization of the evidence against him as to the other counts.

As to count 3, defendant asserts that there was no evidence that the firearm was stolen.[6] Though the police reports do not indicate that the firearm was stolen, the evidence was undisputed that defendant possessed a firearm under circumstances in which it was unlawful to do so. The police reports reveal at least three firearm offenses, including one count of possession of a concealed loaded firearm that was not registered to him and two counts of transportation of a firearm in a vehicle. (See former §§ 12023, 12025, subd. (a), 12031, subd. (a).) Thus, if defendant had not entered his no contest plea

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[6] The complaint alleged that defendant possessed a concealed firearm with knowledge or reasonable cause to believe the firearm was stolen. However, the trier of fact was not required to find either that the firearm was stolen or that the defendant knew or had reasonable cause to believe the firearm was stolen. Under former section 12025, subdivision (a)(2), these were not elements of the offense, but were sentencing factors under former section 12025, subdivision (b)(2).

at the complaint stage, the prosecutor could have amended the complaint to charge one or more of these offenses.

Defendant also argues that none of his statements would have likely resulted in a conviction for making criminal threats, because there was no evidence that Garcia ever received threatening communications or experienced any sustained fear as a result.

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

"'It is clear that the nature of the threat cannot be determined only at face value. Section 422 demands that the purported threat be examined "on its face and under the circumstances in which it was made." The surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat,' and such threats must be 'judged in their context.' [Citations.]" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 807.)

Here, the police responded to a report that a man with a gun had threatened his wife. Defendant had been verbally abusing and harassing Garcia for the two months prior to the incident and had recently begun threatening violence against her. The day

before the incident, he threatened to kill Fuentes and showed his gun to one of her sons. Earlier that day, defendant told Garcia that he wanted to talk about their relationship and that he would "settle that problem" of her boyfriend. Her son told her that defendant had a gun as she listened to him yelling for her and her boyfriend to come outside. Thus, defendant's words and conduct communicated to Garcia that if she did not resume her relationship with him, he would harm her. That he attempted to enter the house through the window and he caused the telephone to cease functioning could only have increased her fear for her safety. Moreover, the prosecutor could have also charged a second count of criminal threats against Fuentes, who was also in the house when defendant was threatening to kill him. In addition, the prosecutor could have alleged that defendant was armed with a firearm while committing this offense (§ 12022, subd. (a)).

In addition to the very strong case against defendant, his criminal history would not have made him a candidate for more favorable treatment by either the prosecutor or the trial court. Though defendant had not been previously convicted of a felony, his "criminal history, which began in 1984, reveal[ed] 16 prior misdemeanor convictions for the following offenses: Driving Under the Influence of Alcohol (2); Driving Under the Influence with 0.08 Percent Blood Alcohol or More (5); Driving on a Suspended/Revoked License (4); Unlicensed Driver (2); Domestic Violence; Drunk in Public; and Animal Fighting." The probation officer also noted that a "review of the lethality risk assessment for future violence reveal[ed] the defendant possesses 13 of the 21 lethality factors believed to be predictors of future violence." When defendant was sentenced in the present case, he was also sentenced in another case in which he pleaded no contest to driving under the influence with a prior conviction and driving on a suspended/revoked license with two prior convictions.

In sum, when defendant pleaded to the offenses at the complaint stage, he avoided the risk of additional felony convictions that would have resulted in a longer period of

incarceration as well as the same adverse immigration consequences. Thus, the trial court did not abuse its discretion in finding that defendant failed to establish prejudice.

IV. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Márquez, J.